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THE NUMBER OF HERITABLE BANDHUS IN THE MITAKSHARA SYSTEM.

(*Continued from page* 147.)

We shall now proceed to examine the schemes and lists of some of the other writers of the present day on Hindu Law.

BHATTACHARYA.

This writer has adopted entirely the scheme of Sarvadhikari as well as all his principles and rules. His sole difference with him consists in the matter of placing S_4 of M_2F and M_2F_2. He also agrees with Sarvadhikari in the latter's peculiar and unwarranted conception of the Atma bandhu class.

MAYNE.

At one time (5th Ed.) Mayne could not recognise more than 27 bandhus in all. But his figure in the 9th edition has risen to 128. His list is essentially evolved out of Sarvadhikari's principles except in the matter of the order of succession which now radically differs from that of every other writer. Following Sarvadhikari, Mayne includes FMF_3 and S_2DS_2. It has already been pointed out that Sarvadhikari's final list differs from what is stated by him in the body of the chapter in dealing with these two persons and their lines. Mayne discards the final list and follows the principles stated in the body of the chapter. He therefore includes SD_2S and S_2DS_2 of P and F_1 to F_4 and omits all the cognatic descendents of FMF_3. His total figures include the following groups:

Cognatic ascendents	8
Their 4 agnatic descendents	32
7 cognatic descendents of these excepting those of FMF_3	49
8 cognatic descendents of F_1 to F_4 ..	32
7 cognatic descendents of P	7
Total excluding DS ..	128

Mayne has thus rectified the two defects in Sarvadhikari's List. But Mayne omits S_2DS_2 of FMF and FMF_2 whom Sarvadhikari admits.[8] On the principles of Sarvadhikari, as they stand, there is no reason to exclude these two.

TREVELYAN.

With some modifications Trevelyan adopts Sarvadhikari's scheme. He follows Sarvadhikari in preference to Bhattacharya in placing S_4 of M_2F and M_2F_2.[9] The sub-divisional order is entirely taken from Sarvadhikari except in one respect. The sub-class (*a*) in Trevelyan's pitri and matri groups has been included by Sarvadhikari under Atma Bandhus. In conformity with the view of the Courts based on the specification found in Satatapa's text itself, Trevelyan places the first sub-class (7 cognate descendents of F_3 and F_4) under Pitri Bandhus and the second (7 cognate descendents of MF_2 and MF_3) under Matri Bandhus. Mulla and Gour have also done the same. Trevelyan includes SD_2S of F_1 to F_4 who are inexplicably omitted in Sarvadhikari's final list, but himself omits without any reason whatsoever the three maternal ancestors of P's father—FMF, FMF_2 and FMF_3. There is no authority or reason stated for this omission. Gour's list is a literal copy of Trevelyan's which includes the following groups:—

Cognatic ascendents	5
4 agnatic descendents of 8 cognatic ascendents	32
7 cognatic descendents of cognatic ascendents except FMF_3	49
7 cognatic descendents of F_1 to F_4 ..	28
6 cognatic descendents of P	6
3 cognatic descendents of FMF_3 ..	3
Total ..	123

Like Sarvadhikari, Trevelyan includes three of the cognatic descendents[10] of FMF_3.

MULLA.

Without attempting to make any original study, Mulla has sought to incorporate all the results of the labours of all the

(8) Pp. 610, 613, Table II, facing p. 607.
(9) Hindu Law, 2nd ed., 1917, p. 409, Nos. 114—115.
(10) P. 408, Nos. 72—74.

scholars and Judges in the field of Hindu Law. In the matter of bandhu succession it would have been better if he had been a little more explicit in specifying the authorities he relies and the reasons, if any, for following them.

In his latest (6th Edition) Mulla has made considerable changes. He had, like Trevelyan, excluded[11] FMF, FMF2 and FMF3 whom he now brings in.[12] Mulla amended Sarvadhikari's view of the fourth fundamental rule of bandhuship, *viz.*, that the heir must be in the line of the MF of either P or P's parents, by omitting the MF line of P's father and on that basis sought to exclude FMF, FMF2 and FMF3[13]. As to how he evolved this rule, we are not in a position to understand. If this rule were to hold good, then all the descendents of these three ascendents would cease to be heritable bandhus inasmuch as they trace their sapindaship to P through these common ancestors. (*Vide* Rule 3.) For the same reason, DS2 and SDS2 (and S2DS2 whom, however, Mulla does not recognise) in each line would be excluded for want of mutuality of sapindaship. Without however recognising these consequences of his rule, Mulla went on repeating it, until in the latest edition he has completely dropped it.[14] In the previous editions Mulla had included[15] all the 7 cognatic descendents of FMF3 and he now omits[16] all of them. To justify the inclusion of FMF3 and his 7 cognatic descendents Mulla had formulated a special rule to the effect that "in counting the father's maternal ancestors, the father's mother is to be excluded."[17] This rule is now amplified so as to suit the new modifications by the addition of a proviso to the effect that "in determining the degree of relationship of the cognate descendents of the father's maternal ancestors, the father's mother is to be included."[18] Lest under this amplified rule FMF4 might creep in, Mulla formulates an all-round five-degree rule[19] in the very words of the Privy Council.[20] For the former amplification the authority cited is Sarvadhikari's 2nd ed., p. 613. But we

(11) Hindu Law, 3rd ed., 1919, S. 44-A (3), p. 52.
(12) *Ibid.*, 6th ed., 1929, p. 55.
(13) 3rd ed., p. 50, S. 44-A (3).
(14) P. 52, S. 47.
(15) 3rd ed., p. 54.
(16) Pp. 50, 55.
(17) 3rd ed., p. 51, S. 44-A, Explanation II.
(18) P. 50, S. 47, Explanation II.
(19) *Ibid.*, p. 49, S. 47 (1) (*i*).
(20) I.L.R. 42 Cal. 384.

do not find any such rule or reason stated by Sarvadhikari for the inclusion of FMF 3 and the exclusion of his cognate descendents. The rule is wholly Mulla's invention. Dr. Gour who had in his previous edition altogether missed[21] this earlier rule of Mulla has now incorporated into his latest edition the amplified rule.[22] It is difficult to understand the reason for this rule. Mulla does not state any nor does he cite any authority to justify it. Sarvadhikari's reason for the inclusion of FMF 3 is different and has already been noticed. In fact Sarvadhikari frankly wants a rule of six degrees in this particular case and does not want to make us believe like Mulla that FMF 3 is really within 5 degrees only. It may be suggested in justification of Mulla's rule that, in a scheme of "frog's leap" sapindaship appears to leap over FM and therefore she does not count in the reckoning. But this is not correct. Sapindaship in such a case really leaps, not over her but over her son. It is because she is counted as a real unit that her son will not be a sapinda of FMF 4. Otherwise there would be no occasion at all for a "frog's leap."

In all other respects Mulla follows Sarvadhikari except in the matter of the order of succession. He has adopted entirely Sarvadhikari's version of the fourth fundamental rule as well as the other rules. He notices *Kesar Singh's case*[23] but is not prepared to follow it. He does not seem to be aware of all the implications of that decision. His order of succession (unlike Mayne's) is that of Sarvadhikari as modified by the judicial decisions. He even has sought to incorporate the view of the Privy Council in *Vedachala's case*[24] by bringing in MF and 7 of his descendents into the very midst of the daughter's sons of the agnatic lines of P.

His scheme includes the following groups:—

Cognatic ascendents	..	..	8
Their 4 agnatic descendents	..	..	32
7 cognate descendents of the cognate ascendents except FMF	..	..	49
7 cognate descendents of F1 to F4		..	28
6 cognate descendents of P	..	..	6
Total		..	123

(21) Hindu Code, 2nd ed., 1923.
(22) P. 1295, para. 2652; p. 1301.
(23) I.L.R. 49 M. 652. Mulla provides no place for the heir recognised here.
(24) I.L.R. 44 Mad. 753 (P.C.).

GOUR.

There is not any originality in Gour's treatment of bandhu succession. He takes everything from everybody without acknowledgment and without proper assimilation. The result is a patch work. In spite of his overwhelming revision in his latest ponderous edition, every page bristles with errors. There is no errata appended to the work. It is often hard to call some of these errors mere printing mistakes. Thus, for instance, at page 1303 (S. 2669) Gour gives several figures almost all of which appear to be incorrect. His figures are thus stated:

Total number of descendents	..		123
do. of collaterals—			
Ex parte paterna	..	64	168 (?)
Ex parte materna	..	31	
Father's bandhus	..	36	
Mother's bandhus	..	17	
Grand Total	..		391 (?)

Here the total for collaterals would be 148 and the grand total 371. The figures purport to represent the total number of bandhus within 5 degrees. As regards the first group, the 4 agnate descendents of the 8 cognate ascendents and the 7 cognate descendents of the 13 lines would come to 123. But since DS_3, DSDS, D_2S_2 and D_3S, who are excluded on account of Sarvadhikari's version of the fourth fundamental rule, are within 5 degrees, we have to include these 4 descendents of all the 13 lines which would make the total 175. The second group does not differ from the first. If it consists of only collaterals its total would be 175 *minus* the 11 descendents of P. If it includes the bandhus of all the three classes, its total would be 175 descendents *plus* 8 cognate ascendents. But curiously enough Gour adds up the figures of both the groups. The whole thing is thus most inexplicable. Nevertheless all these figures are to be found verbatim at page 1002 (S. 2327) of his previous edition. The figures for the subdivisions are also all wrong.

Gour's List consists of 123 persons and is a verbatim reproduction of Trevelyan's. He however adds 3 unclassified heirs (S. 2775, p. 1369) who have been recognised by recent decisions. These are (1) F_3SDS,[25] (2) F_2DS_2,[1] (3) F_2DSDS.[2]

(25) I.L.R. 47 A. 10.
(1) I.L.R. 47 A. 172.
(2) I.L.R. 49 Mad. 652.

But of these the first is identical with No. 44 and the second with No. 10 of Gour's own list. His No. 10 (page 1360) contains two persons numbered as one—SDS_2 and S_2DS_2. The Chart facing page 1368 also numbers both these as No. 10 only. This unnumbered mention of S_2DS_2 is however confined to P's line only. Gour's No. 42 (p. 1365) must be mother's brother's D_2S. His Nos. 75—77 ought to mention the great great grandson and not S_3. These are obvious printer's mistakes.

Gour no doubt notices in detail *Kesar Singh's case* and collects the criticisms against Sarvadhikari's version of the fourth fundamental rule, which he, although not being able altogether to separate it from the second rule, still differentiates by calling it "an additional test of mutuality" (page 1348, S. 2748). But his list does not outgrow the limitations of this rule. Nor is he able to recast it in the light of *Kesar Singh's case* and *Vedachala's case*. He notices the latter case but is unable in his list to put the maternal uncle before F_2DS_2 just as Mulla has done. He reproduces Mulla's rule about the counting of FM. He however does not account for the exclusion of the three maternal ancestors of P's father and has not said a word about it.

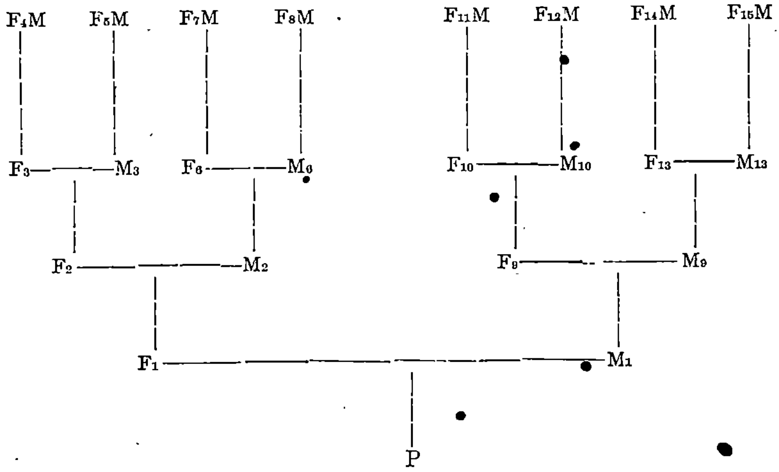
P. R. GANAPATHI AIYAR.[3]

Being a great scholar Mr. Ganapathi Aiyar cannot avoid being original and in his article he has given us an over-dose of originality. He clearly accepts the second and the third fundamental rules of bandhuship and repudiates Sarvadhikari's version of the fourth rule. He does not explicitly state, like the Privy Council in *Ramachandra's case,* that in bandhu succession a universal rule of five degrees should be adopted, but his scheme is based on such a rule. He is opposed to the recognition of female bandhus[4] and the introduction of the test of spiritual benefit for settling the priority of succession[5] in the Mitakshara system. He has framed[6] elaborate rules about the intervention of females between P and the heir which are all now perhaps only of historical interest. *Kesar Singh's case* definitely rejects them. It must also be noted that Sarvadhi-

(3) 8 M.L.J. 313—324; 9 M.L.J. 54—71 and 147—163.
(4) 9 M.L.J. 163.
(5) *Ibid.,* pp. 157—160.
(6) *Ibid.,* pp. 161—162.

kari who had in fact originated these rules in his first edition (page 689) has omitted them in the new edition. But it is in his calculation of the heritable bandhus that Mr. Ganapathi Aiyar has sought to be most original. He makes a distinction between bandhus in general and *one's* heritable bandhus. The distinction is not very clear. The bandhus in general are calculated and ascertained starting from P himself and they cannot therefore be different from the latter group. Besides, the Mitakshara cites Satatapa's text to state, not that *your* bandhus are of three classes but bandhus are of three classes. Anyhow, on this theory of doubtful validity, Mr. Ganapathi Aiyar adopts a most clumsy, unintelligible and round-about method for the calculation of heritable bandhus, which could have been very simply done on the basis of the following table:—

TABLE III.



N.B.—Descendents as in Table II.

Under this scheme there would be 16 lines including P's and in each line there would be 11 male descendents since we have to include D2S2, D3S, DS3 and DSDS who had been rejected by Sarvadhikari under the fourth rule. The result is as follows:—

Cognatic ascendents	11
Their 4 agnatic descendents	44
11 cognatic descendents of 15 ascendents ..	165
10 cognatic descendents of P	10
Total ..	230

But what is the ground for cutting down the rule of 7 degrees where relationship is traced through a male into one of five degrees? Textual authority is against it. Each of the other three fundamental rules cuts off a large number of lines beyond the fifth degree. But this reduction is not complete. Even when we accept all these three rules in full we have to go beyond five degrees at least in one case (*viz.*, FMF3). But since Mr. Ganapathi Aiyar discards Sarvadhikari's version of the fourth rule he has to include several other lines. There can be no justification at all for their exclusion.

MANDLIK'S SCHEME.

Mandlik has prepared Tables to calculate the total number of persons that fall within prohibited degrees of sapindaship for marriage. Our Table IV on the next page would suffice to explain his scheme. Here we find 32 ascendent lines on the paternal and 7 on the maternal side. Descendents through a son up to 7 degrees would be 63. If descendents through a daughter are also counted up to 7 degrees, as Mandlik does, they would be 63 instead of 15. Mandlik's calculations proceed thus:

63 descendents of 32 paternal lines	..	2016
15 descendents of 7 maternal lines	..	105
Total	..	2121

There would be for each person 2121 male and 2121 female sapindas. For purposes of marriage the total would not exceed 2121 as we have to take sapindas of only one sex that is opposite to that of the person concerned, but for other purposes we can total the total of both sexes. Hence the total number of sapindas of P according to Mandlik would be 4242.

This requires a slight rectification. These are all collaterals of P to whom his 126 descendents and his (32 *plus* 7) *into* 2 *equals* 78 ascendents should be added. The proper total would then be 4446.

But this includes agnates also. Agnatic sapindas within 7 degrees come to 57. Barring wife (or husband) who has not been included in the total, the total cognate sapindas of P

is 4446 *minus* 56 *equals* 4390, of whom 2174 are males and 2216 are females.

THE SCHEME OF "JURISPRUDENCE."[7]

This writer after pointing out the distinction between the Mitakshara and the Dayabhaga systems goes to calculate the number of heritable bandhus on the basis of Mandlik's scheme. He is for the rejection of all female bandhus. He then devotes all his space to an effective demolition of Sarvadhikari's version of the fourth fundamental rule.

He disputes Mandlik's total of 4242 and by a clumsy method of calculation arrives at a total of 2325.[8] This can be represented by the following simpler method of calculation:—

63 descendents of 32 paternal ascendents ..	2016	2121
15 descendents of 7 maternal ascendents ..	105	
126 descendents of P	126	204
78 ascendents of P	78	
Total ..		2325

Here this writer rectifies the omission made by Mandlik but himself omits one entire set of collaterals numbering 2121. His further processes of distillation are still more interesting. He arrives at the figure of 382 thus[9]:

Maximum number of sapindas	2325

Deduct from this—

(*a*) Agnates.

P's F_1 to F_6 and S_1 to S_6 ...	12	30
P's M_1 to M_6 and D_1 to D_6 and daughters of F_1 to F_6 ...	18	

(7) 8 M.L.J. 53—72 and 99—110. The writer is said to be Sir V. Bhashyam Aiyangar, *Kt.*, B.L. *Cf.* 27 M.L.J. Notes of Indian Cases 110.

(8) 8 M.L.J. 63—64.

(9) *Ibid*, pp. 66—7.

(b) Cognates who have no mutuality. 48 descendents of 31 paternal ascendents of P ..		1536	
Total ..			1566
Balance ..			759
(c) Female bandhus.			
Total ..		1163	
Agnates ..	18		
Non-mutual (half of 1536) ..	768	786	
		377	377
Male heritable bandhus ..			382

These calculations are not correct. The daughters of F_1 to F_6 would never be agnates. P's D may be an agnate but a D_2 or D_3 would only be a bandhu. This writer strangely omits P's DS, and S_1 to S_6 of F_1 to F_6 from the list of agnates. He rejects in each line 48 out of 126 descendents for want of mutuality. But as he takes only 63 descendents for each line he must deduct 24 and not 48 from each line. He has not explained why a similar deduction should not be made in P's line and in that of the other remaining paternal line. His figures for female bandhus are also incorrect for the same reasons.

This writer does not allude to the third fundamental rule at all. He however accepts the second rule. As already stated this reduces the rule of seven degrees to one of five degrees except in a few cases. The writer is not alive to this effect. He will have to cut off not merely a large number of descendents but also several ascendent lines.

SCHEME UNDER KESAR SINGH'S CASE.

This scheme does not materially differ from the foregoing except in the matter of taking only five degrees among descendents through a daughter. In each line there would be 63 *plus* 15 *equals* 78 descendents (39 male and 39 female) instead of 126. Our Table IV exactly illustrates this scheme. Of these descendents 24 would not have mutuality of sapindaship which requisite is accepted by the Judges. The total would be as follows:—

Paternal ascendents	64
Their 54 (78 — 24) descendents of 32 lines	1728
P's descendents	54
Maternal ascendents	14
Their 30 descendents of 7 lines ..	210
Total ..	2070
Males 1035.	
Females 1035.	
Agnates	56
Cognates	2014
Males (1035 — 49) 986.	
Females (1035 — 7) 1028.	

But here again we have to exclude several ascendent lines on account of want of mutuality.

To make our criticisms on the foregoing schemes quite intelligible we must pause here to consider the exact effect of each one of the fundamental rules on the total number of bandhus. Each one of them excludes certain ascendent lines and descendents. A comparison of our Tables II, III and IV would explain this. Our references are to our Table IV.

Rule Two—the rule of mutuality—excludes among ascendent lines (1) twelve lines that trace to P through a daughter but are beyond five degrees, *viz.*, Nos. 11, 13, 15, 17, 18, 20, 22, 24, 26, 28, 30, 32 and (2) thirty-eight cognate descendents of Nos. 5, 6, 12, 14, 16, 19, 21, 23, 25, 27, 29, 31 who trace to the common ancestor immediately through a female so that to them P would not be a sapinda as he is beyond 5 degrees from the common ancestor. These are as follows:—

			Males.				Females.
VII Degree line	3 and 4 of each block	..	8	*plus*	8	*equals*	16
VI do.	1 and 3 of *b, d, f, h*	..	4	„	4	„	8
V do.	1 of *c, d, g, h*	..	2	„	2	„	4
IV do.	1 of *e, g*	..	1	„	1	„	2
Blocks I & J	Nos. 2, 3, 6, 7, 10, 11, 14, 15	..	4	„	4	„	8
	Total	..	19	„	19	„	38

Barring these there would remain 40 descendents of whom 34 are cognates. Among descendents Rule II excludes 24—3 and 4 of each block in the 7th degree line and 1 and 3 of

blocks *b, d, f, h* in the 6th degree line. To these 24, the common ancestor would be beyond 5 degrees. The total number of bandhus under a scheme where this rule alone is accepted, as in *Kesar Singh's case*, would be, not 2014 but as follows:—

Paternal ascendents (32 *minus* 12) 20 lines ..	40
40 descendents of 12 of them ..	480
(78 *minus* 24) 54 descendents of (32 *minus* 12 *minus* 12) 8 lines	432
P's descendents	54
Maternal ascendents	14
Their 30 descendents of 7 lines	210
Total ..	1230

Males 615.
Females 615.

Agnates 56

Cognates 1174

Males (615 *minus* 49) 566.
Females (615 *minus* 7). 608.

If female bandhus are not taken into account the total number of heritable bandhus would be 566 and not 382 as Bhashyam Aiyangar states.

Rule III is as already suggested, a simple extension of the second rule. The second rule enjoins mutuality of sapindaship between P and the heir who form the two ends of a chain of relationship. Rule III wants that every link in this chain should possess mutuality of sapindaship with one another and with both the ends. Both thus form parts of a single universal rule of mutuality. In a sense both these parts must be accepted together and we cannot accept one and reject the other. This is what Sarvadhikari and Ganapathi Aiyar have done. As regards the third rule we cannot stop with the case of the non-sapindaship of P's father only. It is only logical to extend it to cover all cases of non-sapindaship of every one of the ascendents and descendents of P through whom P is related to the heir. Similarly we must also see from the side of the heir all cases of the non-sapindaship of every one of his ascendents and descendents through whom he is related to P.

Among descendents rule three excludes only those of the 7th degree line. It excludes 8 of them of blocks *b* and *d* as P is beyond 5 degrees to one of their parents. It further excludes

16 of them of blocks *e, f, g, h,* as they are beyond 5 degrees to P's son who is related through his daughter. Out of this total of 24, twelve (3 and 4 of *b, d, e, f, g, h*) are also excluded by rule two. Rules II and III together would therefore exclude 24 *plus* 24 *minus* 12 that are common to both, that is 36. Out of a total of 48 belonging to the sixth and seventh degree lines, twelve descendents (Nos. 5, 6, 18, 21, 22, 25, 26, 29, 30, 33, 40, 41) survive both these rules. Two of these are agnates and 10 are cognates. If Sarvadhikari's rule four were also adopted, 8 out of these 10 would be cut off and the only cognate descendents beyond 5 degrees that survive all these rules would be No. 21—S_2DS_2 and No. 22—S_2DSD.

Among the 32 paternal ascendent lines Rule III excludes (1) ten entire lines, Nos. 19 and 23 because to their sons P is beyond 5 degrees on the daughter's side, and Nos. 25, 26, 27, 28, 29, 30, 31, 32 because they are beyond 5 degrees from P's father on his maternal side; (Nos. 26, 28, 30, 32 are covered by Rule II also, so that both these rules would exclude 12 *plus* 10 *minus* 4 *equals* 18 lines); (2) 24 descendents in P's line and in F_1 to F_4's lines; (3) all descendents beyond 5 degrees in the remaining 16 cognatic ascendents, because an ascendent of P traces to their common ancestor through a female, so that these 48 descendents will have no mutuality of sapindaship with such interlinking ascendent of P; (4) and all the cognatic descendents of such of the surviving 14 lines as are in the 6th and 7th degree lines, who trace to the common ancestor through a female and to whom P would be beyond 5 degrees from such common ancestor.

The combined effect of both these rules would be as follows:—

They would exclude 18 paternal ascendent lines out of 24 of the 6th and 7th degree lines. In these remaining 6 lines, all but 4 agnatic descendents are excluded. In the 8 paternal ascendent lines within 5 degrees to P, these rules reduce the descendents to 5 degrees and to a total of 30 only. In P's line they exclude 36 descendents. A scheme based on these two rules would consist of the following groups:—

		Males.	Females.
Paternal ascendents	..	14 *plus*	14
4 agnate descendents of 6 lines Nos. 5, 6, 12, 14, 16, 21	..	24	

		Males.		Females.
30 descendents of 8 lines Nos. 1, 2, 3, 4, 7, 8, 9, 10	..	120	*plus*	120
42 descendents of P	..	21	,,	21
Maternal ascendents	..	7	,,	7
Their 30 descendents	..	105	,,	105
Total	..	291	,,	267
Agnates	..	37	,,	7
Cognates	..	254	,,	260
Total	..	514		

Ganapathi Aiyar's figure is 230 to which we have to add 24. These are 4 ascendents—Nos. 12, 14, 16, 21 and 4 agnate descendents of each of them, and 4 descendents of P, Nos. 21, 25, 29, 40. If Sarvadhikari's rule four were also accepted it would exclude all these except ascendent No. 14 (FMF_3) with 4 of his agnatic descendents and descendent No. 21 (S_2DS_2) who are both recognised by Sarvadhikari.

Under Sarvadhikari's version of the fourth rule would survive (1) 6 agnatic and 31 cognatic descendents out of 78; and (2) among ascendents only 15 lines—Nos. 1, 2, 3, 4, 5, 6, 7, 9, 14, 25, 33, 34, 35, 36, 38; and (3) among these, 37 descendents in the paternal lines and 22 descendents in the maternal lines (33, 34, 35, 36, 38).

We shall conclude by examining two other schemes which have eschewed all these rules.

SARKAR SASTRI'S SCHEME.

This writer wants to take maternal ascendents also up to 7 degrees and descendents of them as well as of every other line even when related through a female, up to 7 degrees. In such a case there would be 32 paternal lines and 31 maternal lines *plus* P's. In all lines there would be 126 descendents. The total would be as follows:—

Ascendents—Paternal	..	64
Maternal	..	62
Descendents—126 x 64	..	8064
Total	..	8190

Males 4095. Females 4095.

By deducting 56 agnate sapindas we get a total of 8134 cognates, of whom 4095 *minus 7 equals* 4088 are females and 4095 *minus* 49 *equals* 4046 are males. This extension of degrees up to 7 where relationship is traced through a female may be in accordance with Manu and many others but it cannot be justified in the Mitakshara system where the rule of Yajnavalkya is accepted.

HARADATTA'S SCHEME.

In the computation of degrees for purposes of marriage, Hindu writers have developed two theories. These have been explained at length in a recent article in 31 Law Weekly of Madras (January Issue, Parts 3 and 4, pp. 9—16 and pp. 17—24). The heirs or sapindas of P are to be ascertained not directly in reference to him but in reference to a common ancestor. The first thing to be done is to ascertain a common ascendent who is a sapinda of P—a *Sapinda Kutastha* as he is called; the next thing is to ascertain the relations of this sapinda common ancestor. In ascertaining these relations of the latter difference of opinion has arisen. The school of Kamalakara (which includes Anantadeva, etc.) holds that the entire progeny or *santati* of this common sapinda ancestor unlimited by any number of degrees are to be deemed to be the sapinda relations of P. This theory is called the *Sapinda Kutastha Santatitwa*—theory of relationship of progeny to a sapinda common ancestor. The school of Haradatta (which includes Vachaspati, Balam Bhatta, Nagesa, etc.) holds that we must take only the sapinda relations of this common sapinda ancestor. This theory is called *Sapinda Kutastha Sapindatwa*—theory of sapinda relationship to a sapinda common ancestor. The writers state that there would be no want of mutuality according to the latter theory, as there would be according to the former.

But this idea of mutuality is fundamentally different from that of Sarvadhikari and the modern writers. Haradatta wants that sapindaship should be ascertained from the point of view of P and the common ancestor, whereas Sarvadhikari wants that sapindaship should be ascertained from the point of view of P and the heir and of all the interlinks. This leads to fundamental differences. In the first place, what is wanted by Haradatta is that the common ancestor must be a sapinda of P and not that P should at the same time be a sapinda of this common ancestor. This would restore the 12 paternal lines excluded by rule two. In the second place, it is the heir that

should be a sapinda of the common ancestor and not *vice versa,* so that it is unnecessary that P should be a sapinda of the heir. In the third place, it is unnecessary that the common ancestor or P or the heir should be a sapinda of any other intervening person. The practical result is that every bandhu who is excluded by Rules II to IV would be included in Haradatta's scheme. Haradatta demands only two requisites—sapindaship of the common ancestor to P and of the heir to such common ancestor. This is the only mode of computation that is known to Hindu writers. Even the common ancestor need not possess mutuality of sapindaship to P and the heir. In computation we start from P to the common ancestor and then from the latter to the heir, and from none else to none else. Even in the maternal ascendent lines we have to adopt the rule of 7 and 5 degrees for their descendents. Our Table IV exactly illustrates Haradatta's scheme which contains the following number of bandhus:

Ascendents 39 x 2	78
78 descendents of these and of P 40 x 78 ..	3120
Sapindas	3198
Agnates	56
Cognates	3142

Males 1599 *minus* 49 *equals* 1550.
Females 1599 *minus* 7 *equals* 1592.

According to Kamalakara the progeny of these 40 lines would be not 78 but infinity.

CONCLUSION.

The above review establishes (1) that the fundamental Rules two, three and four cannot be supported on any ground, and (2) that the only scheme of bandhuship that is warranted both by authority as well as by logic is that of Haradatta. The conflict of views among modern writers and Judges is mostly due to the wrong lead given by Sarvadhikari which they want to support in varying degrees by means of arbitrary speculation and mere guess work.

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SUMMARY OF ENGLISH CASES.

In re DRABBLE BROTHERS, (1930) 2 Ch. 211.

Bankruptcy—Fraudulent preference—Payment by principal innocently to a creditor on the agent's advice—Agent intending to prefer that creditor—If amounts to fraudulent preference by principal.

Two partners carried on business as builders and contractors. They were doing business through one *T* who acted as their agent to order the necessary building materials and to see to their payment. *T* drew up the cheques and laid them before the partners for signature and then despatched them to the payees. Knowing that the partnership was in insolvent circumstances, and with the intention of preferring a creditor, *T* drew up the cheque for payment to him and in the usual course obtained the principal's signature to it. The principals had no idea of preferring and they innocently signed it under the belief that it was for the current purchases. Within 3 months of the payment, the principals were adjudicated insolvents.

Held, by the Divisional Court (Clauson and Farwell, JJ.) that it may be that when a principal delegates to an agent the making of payments of a particular class, then in considering whether a payment so made is or is not fraudulent preference, the agent's state of mind may be considered, but where the payments are made by the principals (the agent having no funds to pay) and on their own responsibility, then it is their mind and the view with which they made the payments that has to be considered and inasmuch as they made the payments innocently there was no fraudulent preference.

Held, by the Court of Appeal (reversing the Division Bench) that the bankrupts no doubt retained control over the banking account, but exercised no independent determination as to the creditors to be paid or the amounts to be paid to them and delegated all such details to their agent *T*. *T* thereby fully represented the bankrupts in their finances and therefore the view to prefer entertained by the agent was in law the view of the principals. The mere fact that he did not possess the power of actually signing cheques does not matter so long as it is clear that the discretion was entrusted to him to select the creditors to be paid.

A DEBTOR, *In re*, (1930) 2 Ch. 239.

Bankruptcy—Money-lender—Judgment on a loan lent at 270 per cent.—Bankruptcy notice for non-payment—Non-com-

pliance with—Receiving order on moneylender's bankruptcy petition—Validity of—Moneylenders Act, 1927, S. 9.

The petitioning creditors—a firm of moneylenders—obtained a judgment against the debtor on a promissory note executed by him, interest on the loan being 270*l.* per cent. per annum and issued a bankruptcy notice against him for the judgment debt. The debtor failed to comply with the notice whereupon a receiving order was made against him. The question arose if the notice which required the debtor to pay the judgment debt in accordance with the terms of the judgment was good and can form the foundation of an act of bankruptcy when the claim was not limited to 5 per cent. interest on the money actually lent to the judgment-debtor.

Held, that under S. 9 the right of the moneylender to receive a higher rate of interest is preserved but only postponed till payment of all the debts in full and there is no prohibition in S. 9 against the inclusion of a claim for interest at a higher rate than 5 per cent. in a bankruptcy notice founded on a judgment.

ASKEW, *In re.* MARJORIBANKS *v.* ASKEW, (1930) 2 Ch. 259.

Conflict of laws—British subject with foreign domicil—Birth of a daughter by a lady when his marriage was not dissolved—Subsequent dissolution of the first marriage and marriage with the second lady—Legitimation of the daughter under the German law—Appointment of a trust fund in favour of the daughter as his child—Recognition in English Courts—Renvoi, when recognised by English Courts.

By a settlement made on the occasion of the marriage, the husband *J*, then a British subject, settled upon trusts, during his life to apply the income for the benefit of him and his wife and their children and after their death to the issue of that marriage. But if he should remarry, he (*J*) might revoke the trusts concerning a part of the fund and appoint that part in favour of any wife that might survive him or any *child or other issue of such subsequent marriage.* . . . For some years before 1912 he and his first wife had separated, he living in Germany. *J* acquired a *de facto* German domicil before 1911. In June, 1911, the marriage with the first wife was dissolved and in 1912 he married *A* as his second wife. The defendant *M* was born in January, 1911, before the first marriage was dissolved and she was acknowledged by him as his daughter. *J*

purported to revoke the trust fund to the extent permitted and settled it in favour of *M* and *A*. If German Local Law were applicable, then the subsequent marriage would effect *M's* legitimation, though she was born before the divorce.

Held, that as stated in R. 37 of Dicey's Conflict of Laws, "If both the law of the father's domicil at the time of the birth of the child and the law of the father's domicil at the time of the subsequent marriage allow of *legitimatio per subsequens matrimonium,* the child becomes or may become legitimate on the marriage of the parents" but the "law of the father's domicil" there must mean the municipal or local law of the domiciled country (Germany, here) and not as Dicey would mean the whole of the laws applicable in that country (Germany), including the views entertained in Germany as to the rules of private international law. When such matters come before English Courts, the *lex domicilii* in the widest sense must apply and as by the German law *M* had acquired a legitimate daughterhood, she must be treated by an English Court as a legitimate child of *J*.

In re *Johnson,* (1903) 1 Ch. 821, dissented from.

Case-law discussed.

Desirability of making clear by a statute the position of British subjects who acquire domiciles in countries which do not agree with our views as to the effect of a foreign domicil pointed out.

OSBORN *v.* THOMAS BOULTER & SON, (1930) 2 K.B. 226.

Defamation—Privilege—Letter dictated to typist—If privilege lost by such dictation—Reasonable and ordinary course of business.

In reply to a letter from the plaintiffs complaining about the quality of the beer supplied to their public house by the defendant, the defendant replied stating that the plaintiffs were responsible for the deterioration in the quality as they were adding water to the beer supplied and this letter was dictated by the defendant to his typist.

Held, that the occasion of the publication being a communication between the respondent, who alleged that bad beer had been supplied to him, and the brewers, who were protecting their own interests by repudiating the suggestion of supply of bad beer by them and suggesting another cause for the inferiority, was privileged.

Held also that as it is in the usual course of commercial business to write letters by dictating to the typist, the privilege was not lost by such publication to the typist unless it was so written maliciously. If a business communication is privileged, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with a reasonable and usual course of business.

Pullman v. *Hill,* (1891) 1 Q.B. 524, explained away as a decision on facts that in 1891, it was not usual for a member of a business firm to dictate letters to a clerk.

Edmondson v. *Birch & Co., Ltd.,* (1907) 1 K.B. 371, followed.

RALSTON *v.* RALSTON, (1930) 2 K.B. 238: 99 L.J.K.B. 266.

Defamation—Husband and wife—Separate living by agreement—Inscription on a tombstone—Defamatory of wife—Action for libel—If maintainable by wife—Married Women's Property Act, 1882, *S.* 12.

By a deed of separation, the husband and wife separated and were living apart, the husband covenanting to pay an annuity to the wife. The deed also contained a covenant for further assurance. On a tombstone, the husband caused an inscription to be made to the effect "*J* in loving memory of the beloved wife of *R.* . . . Died, 20th May, 1916." The wife was carrying on a motor business.

Held, that the inscription is capable of a defamatory meaning against the wife. But by reason of S. 12 of the Married Women's Property Act, 1882, the wife could not sue the husband upon it, the action being on a libel which is a tort and not for the protection of her separate property. A charge of dishonesty or the like may injure her trade and thereby her property but an imputation of unchastity can in no way affect the ownership or the management of the motor garage.

BIRCH BROTHERS, LIMITED *v.* BROWN, (1930) 2 K.B. 255.

Workmen's Compensation Act, S. 9—*Loss of left eye by accident in the course of employment—Cataract beginning in the right eye at the date of accident—Supervening blindness in right eye—Offer of work by employers' Insurance Company—Inability to accept owing to blindness—Whether complete blindness due to accident.*

A workman met with an accident in the course of his employment which resulted in the loss of his left eye. His right eye was then showing signs of a cataract, which later developed and completely blinded him. He was receiving compensation as for total incapacity. The employers' Insurance Company offered him a job, which the workman was willing to accept if he could be given an escort home. The employers thereupon applied to reduce the compensation by the amount offered to him by the Insurance Company and the County Court Judge reduced the compensation holding that though the workman was unfit for work, yet the condition of the right eye, which was responsible for his inability to work was due not to the accident but to cataract.

Held, by the Court of Appeal (Scrutton, L.J., dissenting) that the County Court Judge was wrong in reducing the compensation. The case was one where the man had been deprived of his one eye at a time when his other eye was diseased and likely to become useless.

If the workman's right eye had been sightless at the time of the accident, he would have been entitled to compensation on the basis of total blindness. The same consequences would follow if the blindness did not immediately result, but arose at a later date, the workman at the time of the accident suffering from a progressive disease, *viz.*, cataract.

Held, by Scrutton, L.J., that though were the matter *res integra* the majority view may be correct, on the authority of *Hargreave's case*, (1912) A.C. 319 and *Lomax's case*, 19 B.W.C.C. 301, the judgment of the County Court Judge was right.

NACHIMSON *v.* NACHIMSON, (1930) P. 217: 99 L.J.P. D.A. 41.

Marriage—Lex loci contractus *permitting dissolution at will of one party without any cause—Marriage if such as can be recognised by English Courts—Validity, if depends on indissolubility.*

The parties, who were both domiciled Russians, went through the procedure requisite for a legal marriage under the Russian law and were by Russian law deemed to be married. Subsequently they lived as man and wife for some years. As the law stood in Russia at the date of the registry of their marriage (1918), a marriage lasted during the lifetime of the spouses but could be terminated by their mutual consent or even by the unilateral desire of either of them subject to a certain

procedure. The Judge on the application for divorce had merely to register the divorce and it was not necessary to adduce any proof of any cause for divorce. The question arose if the parties have contracted a marriage that is to be recognised as such by the Courts of this country.

Held, that as regards marriage—putting aside the question of capacity—*locus regit actum.* The validity of a marriage celebrated in a foreign country conforming in all respects to the definition of a Christian marriage, as understood by the English law, does not depend upon whether under the law of the country where it was celebrated it could be dissolved more or less readily. The marriage here was the union of one man and one woman to the exclusion of all others; it was to last for life unless dissolved and was duly entered in the registers as required by Russian law. Because the method of dissolution was simple, and at the discretion of one party, the marriage cannot be treated as in essence merely a union at will and not a union for life.

APTED *v.* APTED AND BLISS, (1930) P. 247: 99 L.J.P. D.A. 73.

Divorce—Practice—Adultery of the husband petitioner—Statement in petition that he was guilty of one act of adultery—Untrue statement—Discretion of Court to grant decree—Effect of false statements or suppression of facts—Principles guiding exercise of discretion.

The petition stated that the husband (petitioner) was deserted by his wife while he was on active service during the great war, when so deserted was guilty of one isolated act of adultery and later led into cohabitation with a woman other than his wife under an erroneous belief that his wife had procured a divorce and this was repeated by the sworn testimony of the petitioner. In cross-examination all these statements were found to be false but that he was guilty of adultery himself.

Held, that in the circumstances the Court cannot exercise the discretion in the petitioner's favour. It may be that even where the falsehoods of petitioners are exposed, the Court may properly consider whether on a true statement of the facts in the first instance the discretion would have been exercised. The discretion must be a sound judicial discretion. The interest of the community at large in maintaining the sanctions of honest matrimony is a governing consideration; a strong affirmative

case is necessary before a Judge is satisfied under the statute in negativing their conditional prohibition. It is manifestly contrary to law that a judicial discretion should be exercised in favour of a litigant guilty of misconduct in the matters in question where that course will probably encourage immorality. The petition must state truly the facts on which the discretion is sought. Full force ought to be given to the misconduct of the suitor and if good cause is shown within the meaning of S. 178 for waiver of the prohibition to grant a decree, then the discretion will not be usually refused.

Case-law discussed and principles guiding discretion laid down.

A petitioner in a divorce proceeding who asks for the discretion of the Court being exercised in his favour but purposely obstructs or diverts the course of justice by not doing what he is commanded or required by lawful process to do or by suppressing facts or stating falsehoods is liable not merely to the dismissal of his suit with costs but also to be committed for contempt.

MOTHERSDALE *v.* CLEVELAND BRIDGE AND ENGINEERING Co., 99 L.J.K.B. 261.

Workmen's compensation—Accident injuring the workman—Partial recovery—Fit for some work—Unemployed—Due to labour conditions and not to accident—Not entitled to full compensation—Judge, if can act on his personal knowledge.

A workman met with an accident as the result of which his right arm was amputated. Full compensation was paid to him for some time based on total incapacity and later it was reduced on the basis of partial incapacity as he was fit for work with one arm. The workman asked for employment at a number of places and had been refused it. The County Judge found using his local knowledge that the failure to obtain employment was largely owing to the bad state of the labour market in the locality and not the result wholly or mainly of the accident.

Held, the Judge was entitled to use his local knowledge and his knowledge as a man of the condition of things in the locality and find what the unemployment is due to on the evidence plus his local knowledge. The state of the local market can be considered to determine the cause for the non-employment and as it was found that the unemployment was due to the labour market and not the result of the accident, the workman was not entitled to full compensation.

Bevan v. *Nixon's Navigation Co.*, (1929) A.C. 44: 99 L.J.K.B. 26 and *Taumach* v. *Brownside Coal Co.*, (1929) A.C. 642: 98 L.J.P.C. 156, followed.

CONSETT IRON CO. *v.* DURHAM COUNTY ASSESSMENT COMMITTEE FOR NO. 5 OR NORTH WEST AREA, 99 L.J.K.B. 277.

Rates and rating—Lessees of coal mines—Collieries lying idle and working at a loss during the year of assessment—No possibility of the properties being let at any rent that year—If liable to rates—Parochial Assessments Act, 1836, *S.* 1.

During the six months of assessment of the year for which the rate was made, the colliery had been working at a loss. There was no likelihood that it would improve within a year and earn profit and no one would have entered into a tenancy of the said colliery property in the period in question at any rent whatever if he had known of the conditions of trade then prevailing. The only basis on which anyone could be found to take it up is on the assumption that his tenancy would continue for a term of years and that later the conditions of trade would improve.

Held, the words in the section were "rent at which (it) . . . . . . might reasonably be expected to let from year to year" and not the "rent you could expect anybody to give for the year of assessment". It is, therefore, legitimate for the Justices in considering the rent which is to be paid to take a period longer than the year of assessment and to take into account the things that may reasonably be expected to happen during the tenancy for which the rent is to be paid. The cases really set up a person called the "hypothetical tenant" who might reasonably pay the rent which is to be taken as the net annual value.

Staley v. *Castleton Overseers,* (1864) 5 B. & S. 505: 33 L.J.M.C. 178, doubted and distinguished as a case where the business had ceased and not one in which the business was in operation but resulted in a loss.

HALLIWELL *v.* VENABLES, 99 L.J.K.B. 353.

Costs—Action for negligence—Court dismissing suit at defendants' instance saying there was no case to go to the jury—Appeal—Remand for new trial—Proper order as to costs—Onus of proving negligence.

A widow, whose husband had been killed in a motor accident, brought an action for damages against the driver of the car. It was stated that the deceased did not pay anything to be carried in the motor car but was carried at the request of the deceased himself. At the end of the plaintiff's case, and partly at the instance of the defendant's counsel, the trial Judge dismissed the action holding that there was no case to go to the jury. On appeal, it was held that the trial Judge struck too soon and that there was evidence which should have been put to the jury and remanded the case for a new-trial.

Held, the mere happening of an accident, unexplained, often is in itself evidence of negligence without going back to find out why exactly the accident happened.

Scott v. *London and St. Katherine Docks Co.,* 3 H. & C. 601: 34 L.J. Ex. at 222, followed.

Per *Slesser, L.J.*—"If a person undertakes to perform a voluntary act he is liable if he performs it improperly but not if he neglects to perform it. The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it."

As regards costs, the plaintiff must have the costs of the appeal. But with regard to the costs of the first trial, if the plaintiff succeeds in the new trial, she would have the costs of the first trial, but the defendant is not to have the costs of the first trial in any event.

SPIVACK *v.* SPIVACK, 99 L.J.P.D.A. 52.

Husband and wife—Wife's petition for maintenance—Nature of evidence—Proof of the fact of marriage—Co-habitation—Further proof, if necessary.

In a claim for maintenance against a husband, the woman (alleged wife) proved that a form of marriage was gone through as prevailed in the community of Jews to which she belonged, that co-habitation followed and that she had children by him. A certificate of its registration was also produced which was vouched by the proper official procedure. and accepted by the Russian authorities, who were then the lawful Government of the District in which the alleged marriage was said to have been celebrated.

Held, that in summary magisterial proceedings for maintenance, strict proof of marriage as may probably be necessary in cases of an indictment for bigamy is not necessary. "Where

there is evidence of a ceremony of marriage having been gone through, followed by the co-habitation of the parties, everything necessary for the validity of the marriage will be presumed in the absence of decisive evidence to the contrary, even though it may be necessary to presume the grant of a special license."

Piers v. *Piers,* (1849) 2 H.L.C. 331, followed.

R. v. *Naquib,* (1917) 1 K.B. 359: 86 L.J.K.B. 709, doubted and distinguished as a case of an indictment for bigamy.

JOTTINGS AND CUTTINGS.

Crime and the Car.—The increase in the volume of crime is mainly attributable to offences against property; and of these the figures with regard to which are called crimes against property with violence, are the most remarkable. This class of offence includes sacrilege, burglary, house-breaking, robbery, etc., and the "violence" is often merely technical; but the heading serves conveniently to distinguish the class of cases from that to which simple larceny, false pretences and fraud belong. Sacrilege and burglary have decreased, but the other forms of crime against property with violence have substantially increased, the incidence of the rise in towns and in country districts, respectively, being astonishing. For this purpose, the year 1911 is compared with 1928, and the figures show that whereas in the Metropolitan Police District this class of offence increased by only 10·6 per cent., from 3,304 to 3,654, it increased in the Home Counties—those parts of Hertfordshire, Essex, Kent and Surrey which are outside the Metropolitan Police District, and Berkshire—by more than four hundred per cent., from 442 to 2,377. This truly alarming increase is ascribed, we doubt not with perfect truth, to the coming of the "motor age," which has enabled the criminally-minded to travel further afield to areas where they are not known and where the police protection to property is necessarily relatively less. Incidentally, the increased mobility of the population owing to the motor-car results in more houses being left temporarily unoccupied and so provides additional opportunity for the would-be thief. We shall hope to refer later to certain other features of the Criminal Statistics, particularly to the disquieting increases in cases of fraud and of obtaining money by false pretences.—*L.J.*, 1930, p. 3.

Barking Dogs.—Once again the innocent, but noisy, friend of man has brought his master into the Courts. The defendants in a recent action (*Gladstone* v. *Murray Wilson, Times*, June 28) consented to a perpetual injunction restraining them from keeping any dogs in their house in Kensington so as to cause a nuisance to the plaintiff by their barking. The case was not fought out on evidence, so we have no guidance as to how much barking the law permits before declaring that the margin of nuisance has been crossed. On the general question of nuisance by noise, on which lawyers are constantly asked to advise nowadays, there is no better guide than the fine judgment of Warrington, J., in *Rushmer* v. *Polsue and another*, (1906) 1 Ch. 234: 75 L.J. Ch. 79, which was affirmed without variation by the Court of Appeal and the House of Lords. Has the defendant done anything which seriously interferes with the comfort, physically, of the plaintiff and his family in the occupation of his house according to the ordinary notions prevailing among reasonable English men and women? That is the first and last question; and it was the issue in *Vanderpant* v. *Mayfair Hotel*, (1930) 1 Ch. 315: 99 L.J. Ch. 84, where after a long hearing, the law in the matter was again clearly repeated. No doubt those "ordinary notions" will vary as time goes on, and we may have to suffer more noise, as with advancing years, our distaste for it increases. It is comforting to think that we have Chancery Judges who, though still young men, have a respect for the comfort of silence.—*L.J.*, 1930, p. 3.

The Nationality of Married Women.—It would seem that the Imperial Conference when it meets will have a pretty full programme for discussion. There are primarily the questions raised by the Report of the Conference on Dominion Legislation, whether, in brief, the present system shall continue, under which Dominion Legislatures have practically a free hand, subject to the nominal revision of the Imperial Parliament; or whether their legislative independence shall be expressly recognised, subject only to exception in matters of extra-territoriality. And South Africa apparently expects an affirmation of the right to secede; not that she either wants to, or that any compulsion would be attempted against her if she did want to; but to have the academic point of constitutional law settled. It appears, too, from a letter in *The Times* of August 30, signed by a number of persons interested in the nationality of married women, that the Conference is expected to deal with this subject also. It is, of course, one of the questions raised by the

modern tendency in favour of the equality of the sexes, though whether it is a matter to which that principle can be conveniently applied is not clear, and at the present time, owing to the variety of rules recognised by different countries, the question has become very complicated. The signatories to the letter form the "Nationality of Married Women" Pass the Bill Committee, and the Bill referred to was introduced in the House of Commons last February for the purpose of establishing that a married woman shall not on her marriage lose her nationality or acquire a new nationality without her consent.—*L.J.*, 1930, p. 144.

The Right to retain Nationality.—The alternative principles which may govern the nationality of married women are: (1) that marriage shall have no effect; or (2) that the wife shall take the nationality of her husband; or (3) that whether she takes such nationality shall depend on her own election; but these are subject to variation. That marriage shall have no effect was the common law rule in England, but it was changed by the Naturalisation Act of 1870, for the second rule, and this is now in force here. It was the rule in the United States until reversed by the "Cable Act" of 1922, and since then a British woman marrying a United States citizen does not, without express naturalisation, become a citizen of the United States. On the other hand, she loses her British nationality, and is, therefore, stateless, while a woman of the United States who marries a British subject at the same time retains American nationality,—though she can make a formal renunciation of citizenship—and acquires British nationality. These cases of statelessness and double nationality are the result of the present contradictory systems. In general, they are avoided under the French nationality law of 1927, which substantially adopts the third rule, and makes the woman's change of nationality depend on her election. All that the Imperial Conference can attempt is to secure uniformity in British and Dominion law, and the signatories to *The Times* letter consider it essential that married women shall have the right to determine their own citizenship, corresponding to their present equality of property and political rights. It is too large a question to argue in a note, but the tendency in Europe appears to be to adopt the English rule, and make the wife's nationality follow that of the husband. Apart from the abstract point of liberty, this is probably the convenient rule. At any rate, the most pressing matter is to secure, not that a married woman shall have any particular nationality, but that she shall not by marriage lose her original nationality without gaining

another. In other words, that by general agreement, the loss of one nationality should be conditional on the acquisition of the other; and this was one of the suggestions of the League of Nations Codifying Committee which recently dealt with the subject. There is a careful survey of the whole question in a paper read by Mr. F. Llewellyn Jones, M.P., before the Grotius Society on November 20, 1929, and printed in the recently published Transactions of the Society (Vol. 15, 1930). Of course, while from the legal point of view it is necessary for each individual to have a fixed nationality, the conception of the importance of Nationalism is quite modern—"an exaggerated and extreme mood," says Mr. Hilaire Belloc, in *Survivals and New Arrivals*, "from which all the white world suffers to-day."—*L.J.*, 1930, p. 144.

The German Constitution.—Eleven years is not much for the testing of a written Constitution, but only that period has elapsed since Germany's fate in the war led to revolution and the replacing of the Hohenzollern dynasty by the Constitution made at Weimar in February, 1919. "Supreme power emanates from the people," so runs Art. 1 in laying down the fundamental principle that the German Federation is a republic, but Art. 4 has a wider tone, and declares that "the rules of international law, universally recognised, are deemed to be part of German Federal Law, and as such have obligatory force." But though the people may be sovereign, and the source of supreme power, this is meaningless unless a way is provided for declaring its will, and so S. II of the Constitution institutes the Reichstag, which must be elected every four years, and the members of which "are, each of them, representatives of the whole people. They are subject to their conscience alone and are not bound by instructions'' (Art. 20). It is an excellent maxim, though in practice it is a hard one for members of Legislatures to observe. The recent elections, which, owing to political considerations, have been held after an interval of two years only, appear to have upset in an unexpected manner the balance of parties, and the result will be for the future to determine. But the hope for democracy is that innate common sense will prevail, even if the multiplication of parties makes stability look impossible. Two points there are of special interest in the 181 Articles of the Constitution. Art. 48 gives emergency powers in case of danger:

"If public order and security are seriously disturbed or endangered within the Federation, the President of the Federation may take all necessary steps for their restoration, intervening, if necessary, by armed force.

Somewhat free use has been made of these powers. There are, indeed, emergency decrees now in operation which the new Reichstag will have to consider. And the Constitution is not fixed and unalterable save in ways as difficult as in the United States. Under Art. 76 it can be amended by legislation, that is, by the Reichstag; though only if two-thirds of the legal total of members are present, and at least two-thirds of those present consent.—*L.J.*, 1930, p. 168.

"Fusion."—The division of the legal profession into two branches appears to be a standing puzzle to part of the lay public, and its meaning is not appreciated by all lawyers. Yet if it was realised that in substance the phenomenon is no more than an instance of the division of labour, the wonderment would cease. The *Morning Post* has been ventilating the subject this week in an article by "A Solicitor" urging fusion as a remedy for the high costs of litigation, and a reply by Mr. H. Fletcher Moulton pointing out that, even under fusion, the client's case would not be managed from start to finish by the same man. The interviews with the client and the investigation of the details of the case go naturally to different persons from those who advise on its technical aspects and who have charge of it in Court. It might be that all this would fall to the same individual, but that would be rare, and the individual would be a person without much business. As Mr. Moulton says: "There would still be specialisation—still the man who worked up the case, and the other man who conducted it—only the client, instead of having his present free choice among the whole Bar, would be bound to accept as advocate a partner in the firm advising him." But it must not be assumed that the result of fusion would be to re-arrange counsel and solicitors in firms including, say, one counsel to two solicitors, the present division of functions being reproduced in, but confined to, the firm. This is not so with the doctors who fall naturally into the two divisions of general practitioners and specialists—the former usually in partnership; the latter always "on their own."—*L.J.*, 1930, p. 179.

Counsel's Fees.—But the view we have expressed does not mean that there is no remedy for the present high costs of litigation, though it would be a mistake to suppose that under any system litigation can be otherwise than expensive. "A Solicitor" in the *Morning Post* scores two points against counsel's fees, one

in regard to K. C.s and the other in regard to juniors. He objects to a leader who has already accepted a brief at what he must be presumed to regard a satisfactory fee, afterwards requiring it to be increased to level it with his opponent's fee. For such a practice there appears to be no justification, and perhaps it is not so general as "A Solicitor" represents. But his other point, that the junior has a right to two-thirds of the amount of his leader's fee, is a rule on which the Bar has hitherto insisted, and there is probably a good deal to be said for it. The fee really covers the work, often very heavy, of the preparation of the case. This is inadequately remunerated by the comparatively small fees paid for settling the pleadings and advising, and if the two-thirds rule were abolished, the Junior Bar would doubtless look for increased fees in these earlier stages. But in fact—apart from the "luxury fees" paid for the employment of counsel of special eminence, and these are entirely at the option of the client—counsel's fees do not form a large part in the bill of costs, and if substantial reduction is possible, it will have to be found elsewhere.—*L.J.*, 1930, p. 179.

An Empire Court of Appeal.—It appears that the discussions in the Imperial Conference which opened on Wednesday will be largely concerned with economic questions; the last Conference, with its formula devised by the late Lord Balfour of equality of status, is likely to be accepted as having settled the basis of the relations of the different parts of the Empire, whatever qualifications may have to be given to the formula in actual working. And the report of the Conference on Dominion Legislation, and on the effect as regards the Dominions of Merchant Shipping Legislation, can hardly fail to come up for consideration. It seems, also, from replies by Mr. Thomas, the Dominions Secretary, on Monday, to questions by Press representatives, that the question of appeals to the Privy Council will come up in a new form, and one of the matters for discussion will be the setting up of an Empire Appeal Court. The suggestion of such a Court was made in Part VII of the Report just referred to, and it may have been assisted by the possibility of disputes between different parts of the Empire being taken to the permanent Court of International Justice; and however necessary it may be that juridical questions between independent States should be submitted to the permanent Court established in connection with the League of Nations, there would naturally be objection to questions between Great Britain

and the Dominions being discussed before the tribunal. They are more suitable for a domestic forum, and if the powers of the Judicial Committee as at present constituted are not wide enough for the purpose, they can be extended. But the adaptation of the existing Empire tribunal would be preferable to setting up an entirely new tribunal. It would seem, however, from the report of what Mr. Thomas said, that a new tribunal may be in contemplation. The proposals, which have not yet taken definite shape, do not appear to involve any interference with the appellate jurisdiction of the House of Lords. They are, therefore, distinct from the plan for a Court of Final Appeal amalgamating the House of Lords and the Judicial Committee such as Lord Haldane advocated.—*L.J.*, 1930, p. 194.

The Ethics of Punishment.—The October number of *The Police Journal* contains, in addition to a number of other articles interesting and useful to the lawyer as well as to the police official, a particularly valuable paper by Sir Reginald Craddock, G.C.I.E., K.C.S.I., on "The Ethics of Punishment," which deserves to be carefully studied by all who have anything to do with the administration of criminal justice. It is generally accepted that the punishment of crime has a fourfold object—retributive, deterrent, preventive and reformative—and the problem constantly confronting Judges and others to whom the power of awarding punishment is entrusted is as to the relative importance to be attached to each of these objects in any particular case. There are those who say that retribution—or vengeance—is not a proper object of punishment at all; but as Sir Reginald points out, it is the only one of the four objects of punishment which really requires proof of guilt; all the other objectives might be attained, although the man punished was innocent of the particular offence charged. And since under any just system retribution must be proportioned to the offence, it prevents unduly heavy sentences being given as a deterrent to others. Sir Reginald Craddock makes a good point when he says that a great deal depends on the prison administration; for no amount of care on the part of the Judge in assessing the proper sentence can avail if the objectives of punishment are not borne in mind by those who are in charge of the prisoner; whilst it is above all necessary that the administration of the criminal law should have the backing of sane public opinion, which may, of course, be a very different thing from public opinion at a particular moment.—*L.J.*, 1930, p. 195.

Lord Birkenhead as a Judge.—The numerous appreciations of Lord Birkenhead which have appeared in the daily and weekly Press mingle admiration of his brilliant career with surprise that his great talents did not give him a more commanding position in the political world. But first of all he was a lawyer, and for lawyers his distinction in their own field is his best title to fame. It was gratifying, therefore, to read in *The Times* of last Saturday the tribute paid him by Lord Dunedin. Agreeing with the general opinion of the excellence of his judicial work as Lord Chancellor, Lord Dunedin ascribes it not to depth of legal learning: "He was not a profound lawyer in the sense in which Lord Blackburn, Lord Macnaghten, and Lord Sumner were when they first became members of the Supreme Tribunals of the House of Lords and the Judicial Committee:" but to his readiness to learn. No false pride prevented him from asking and informing himself until he got the requisite knowledge, and, says Lord Dunedin, his ability did the rest. Compared with the length of time Lord Dunedin has himself been one of the most esteemed members of the Supreme Tribunals, Lord Birkenhead's judicial career was only transient; but it was long enough to impress his colleagues in these Tribunals with his success in a position for which his brilliance as an advocate seemed hardly to have fitted him. And yet if he was not a Blackburn or Macnaghten, there must have been a basis of sound technical knowledge on which his success was built. As to his power to impress himself on the House of Lords, this was never shown more strongly than in *Lady Rhondda's case*, (1922, 2 A.C. 339), when her claim to sit in the House of Lords by virtue of the Sex Disqualification (Removal) Act, 1919—which, in the absence of objection by Sir Gordon Hewart as Attorney-General, had been unanimously allowed by the Committee for Privileges,—was, at Lord Birkenhead's instance, rejected on a second hearing by 22 to 4. Of the legal Peers on the Committee, only Lord Haldane and Lord Wrenbury resisted his argument based on the strict terms of the grant of the peerage, and adhered to the plain effect of the statute.—*L.J.*, 1930, p. 214.

Birkenhead.—With the passing of Lord Birkenhead went far and away the most vivid legal personality of our time. Opinions may differ as to whether he was a great lawyer in the sense in which that expression is understood by members of the Bench and Bar; but that he was a great advocate and something greatly more is beyond dispute. It is an error to suppose that

the appointments which marked the course of his upward and phenomenal career were thrust upon him. He achieved and attained them by his own deliberate aim and effort. He was fully aware of his own merit and claims, and would never permit them to be overlooked by the person or persons who had the power of appointment. In every case he was quickly justified by the event, and whether as Solicitor-General, Attorney-General or Chancellor, he excelled others with apparent ease and unassailable efficiency.

His desire to outshine all others in the fight for and acquisition of glittering prizes was only equalled by his extreme loyalty to his friends and institutions. He would excel the other scholars of Wadham, but he was the champion of Wadham against Oxford and all-comers, of Gray's Inn against all; of the Northern Circuit against all other circuits of Britain; and there are many in good places to-day who owe those places to those loyalties and friendships of F. E. Smith. None more dignified than he on the Woolsack; but of a night, in the Hall of Gray's Inn, he could make the fighting speech of an undergraduate and maintain the superiority of his Inn as against the "garnished megalomania" of others and the unfounded toasts of those who, "in their cups," would aver that, in age and distinction, their Inns and Houses could compare with the incomparable House of Gray's.—*L.J.*, 1930, p. 222.

His Insolence in a Great Case.—An eye-witness tells me the story of one of his great cases, not included in the number of those which are known and published. At or about the time when he came up from Liverpool there was in London (says the eye-witness) a County Court Judge under whose tyranny solicitors and members of the Bar had suffered for many years. This judge never hesitated to express his poor opinion of the advocacy of those who appeared before him; he would interrupt on all occasions, relevant or irrelevant, and humble the advocate in the presence of his client.

A firm of solicitors who had endured this tyranny for many years briefed F. E. Smith for the plaintiff in a jury case, in the hope that a blow might be struck for freedom. Mr. Smith had hardly begun the opening of his case to the jury when the Judge intervened by asking him if it was really necessary to go into all these details; whereupon Mr. Smith, with deliberate and unhurried insolence, demanded: "How dare you interfere when I am addressing the Jury?" Further encounters took

place in a Court packed with keen observers of the fray; and it was soon obvious that the Judge was not doing well. Finally Mr. Smith advised the Jury not to pay any attention to anything which might fall from the lips of the old man (or old woman) on the Bench; whereat the Judge cried out that Mr. Smith was abominably rude.

Said Mr. Smith: There are two classes of persons who may be so described; those who deliberately intend to be rude; and those who are rude because they cannot help it. I belong to the former class; your Honour to the latter.

A few days later (says my informant) the Judge resigned and the County Courts knew him no more.—*L.J.*, 1930, p. 222.

Mental Deficiency.—A perusal of the sixteenth annual report of the Board of Control recently published brings out the practical possibilities opened up by the Mental Treatment Act in conjunction with the Local Government Act, and the more optimistic reader can at last dare to visualise a treatment of mental illness which will approach more closely to that of physical ailments. When that time arrives there will be no longer the temptation to the so fatal concealment of the beginnings of mental disorder. The section of the report which will capture the interest as strongly as any other is that which deals with the difficulties presented by the problem of mental deficiency, its ascertainment, treatment and control, with its tragic records of disease and criminality traceable to the inadequate supervision of mental defectives. Not once but many times have Magistrates and Judges referred in Court to the unfortunate consequences entailed by the free intermingling of those unfortunates with society generally, and one High Court Judge at least has openly advocated sexual sterilisation, a measure which the Board of Control still thinks merits "careful study and investigation." As a subsequent correspondence in *The Times* has shown, there is by no means unanimity of opinion with regard to the necessity in cases of insanity for adopting this remedy, even with the consent of the patient himself, but surely experience leaves little room for difference in the case of mental deficiency. As the report prudently points out, it would not be eradicated by this means, but, if Professor Julian Huxley's calculation that preventing all existing mental defectives from reproducing would in the course of four or five generations halve the incidence of mental defect approaches anywhere near to correctness, the case for at least the investigation desired by the Board is overwhelmingly strong.—*L.T.*, 1930, p. 271.

The Persistent Offender.—A certain section of the community will always probably make a livelihood by dishonesty, but the growth of the professional criminal class was acknowleged to be most disquieting. It will be remembered that the last issue of the Criminal Statistics drew attention to this persistence in crime and to what it took to be the proved failure of the system of preventive detention. On this subject, too, Mr. Clynes had something to say in his remarks to the Conference, and he concluded his comments by announcing his intention of appointing a Committee to consider the existing methods of dealing with persistent offenders, including those habitual criminals liable under the Prevention of Crime Act, 1908, to sentences of preventive detention. The inquiry, which would be opened as soon as possible, would necessarily, he said, be a difficult one, for the methods of curative treatment might naturally be expected to be as various in character as the predisposing causes.—*L.T.*, 1930, p. 297.

Nationality and the Dominions.—Among the matters before the Imperial Conference which have been referred to Lord Sankey's Committee for examination and report is the important subject of nationality as affected by the existence of the self-governing dominions. Practical necessity ordained that the Imperial Parliament should provide the general rules regarding the admission of aliens to British Citizenship, but practical convenience dictated that there should be a modified naturalization under local Acts. Over a hundred years ago, as Professor Berriedale Keith has noted in his book on the Sovereignty of the British Dominions, recently reviewed in these columns, an urgent need was felt in Upper Canada for machinery whereby American citizens with British ties and interests might, without conforming to the usual elaborate regulations, become loyal Canadian British subjects. The principle of naturalization under local laws was recognised and became permanently operative under the Naturalization Act, 1870, but the two forms of naturalization were markedly different in effect. Naturalization granted here was valid throughout the Empire; colonial naturalization was entirely local.—*L.T.*, 1930, p. 297.

Maintained Wives Living Abroad.—A man named Shelton, summoned at Southend for being in arrears on a maintenance order obtained by his wife, stated that his wages had been greatly reduced since the order was made, but he could not

apply for reduction of the order, because she was living in Germany, and the summons could not be consequently served on her. The justices appear to have dealt with the difficulty by adjourning the wife's summons indefinitely, so long as the husband paid 15*s.* weekly, instead of the £1 required by the original order. Possibly this method of dealing with the problem may be effective, but of course there is no real legal answer to the wife's demand of £1 a week, save by the proper working of the machinery for the variation or discharge of the order. The Maintenance Orders (Facilities for Enforcement) Act of 1920, provides, very rightly, for the enforcement of an order against a husband who is anywhere within the British Empire. Nothing is said in the relevant statutes, however, as to the election of a woman having the benefit of a maintenance order to reside abroad. The whole theory of separation orders, which do not dissolve the bonds of marriage, is that nothing shall be placed in the way of the reconciliation of the parties, and that these orders should never be regarded as permanent. In resisting Lord Buckmaster's bill for further divorce facilities, the late Archbishop Davidson largely based his arguments on the frequency of reconciliation after separation. Whether reconciliation takes place in any but a trifling percentage of cases after separation orders is, no doubt, a controversial issue, but the possibilities of resumed relations must surely be substantially reduced if the wife receiving the money lives permanently abroad, and it is certainly open to question whether it should continue payable in such circumstances. The suggestion may therefore be made that, in addition to the reasons enabling magistrates to vary or discontinue an order, evidence that the wife who has obtained it has been out of the jurisdiction for three months or upwards should give them the necessary power. It would then be open to the wife to prove that her absence was temporary only. Men against whom maintenance orders are made are as a rule in a humble position, and certainly cannot be expected to send private detectives abroad to watch their wives, who thus are left quite free to cohabit with another man, while drawing maintenance money under a strict condition of chastity.—*S.J.*, 1930, p. 391.

Truth in the Box.—The fact recently touched upon by Horridge, J., that highly respectable witnesses sometimes lie is perhaps more familiar to lawyers than to jurors.

Of all the caustic remarks on the reliability of witnesses, I like best one of the judgments of Maule, J.

"Gentlemen of the jury, if you believe the witnesses for the plaintiff, you will find for the defendant. If you believe the witnesses for the defendant, you will find for the plaintiff. If, like myself, you don't believe any of them, Heaven knows which way you will find. Consider your verdict."

Perhaps the mental attitude of the average witness is best illustrated in the engagingly sophisticated answer of a little girl in an Irish court who was being examined on her knowledge of the nature of an oath.

"What will happen to you if you tell a lie in your evidence?" she was asked.

"I suppose, Sir," she replied, "I would not get my expinses."—*S.J.*, 1930, p. 463.

Citation of Judicial Titles.—We sometimes smile at the mistakes committed by foreigners in their efforts to designate English public men. It may be remembered that Mr. Gladstone, not infrequently, in continental newspapers was transformed into Sir Gladstone or Lord Gladstone, and many other prominent statesmen experienced the like misdescription. But errors of this kind are by no means confined to foreigners; even in the law we have had not a few of them. Some years ago a distinguished counsel appearing in the Court of Appeal referred to a decision of "Lord Justice Field," but was at once corrected by Lord Sterndale, who pointed out that there was a Mr. Justice Field, who afterwards became a peer with the title of Lord Field, but as that Judge was never a member of the Court of Appeal he could not correctly be described as "Lord Justice Field." Further examples of judicial misdescription may be found in the recently published biography of the Earl of Halsbury, an otherwise excellent work. There, Lord Macnaghten—with one or two variations in the text of the spelling—appears in the index as "Lord Justice," a title which was never his, as he was promoted direct to the House of Lords from the Bar. In the same work Lord Lindley is "Lord Justice Lindley" in the index, and it is true that he at one time was correctly so designated, but at the material date he was a Lord of Appeal with the title Lord Lindley. Mistakes of this kind are pardonable in the case of a writer unconnected with the law, and thus unfamiliar with the various judicial titles; they are not so excusable in writers of law books in which similar

blunders are occasionally to be found. Even the spelling of the names of the Judges is not invariably orthodox. The late Mr. Justice Channell was once heard to comment on the incorrect spelling of his name, and we observed in an otherwise excellent text book recently issued the precise mis-spelling of which that very learned Judge complained. These may be considered by some people very small matters, but correctitude of citation is considered one of the essential marks of a legal work, and this ought to extend to the titles or names of the Judges whose opinions are quoted.—*S.J.*, 1930, p. 479.

Quare non adhaeret?—What is to be done when an adhesive label refuses to adhere? Under the Copyright Act, 1911, and the Copyright Royalty System (Mechanical Musical Instruments) Regulations, 1912, made thereunder, royalties on gramaphone records and similar contrivances are payable by adhesive paper labels (which are receipts for the royalties paid) to be supplied by the owner of the copyrights to the maker of the records on the demand of the latter and tender of the price equal to the amount of the royalty represented thereby, and no record is allowed to be delivered to a purchaser until such a label has been affixed thereto. In *Boosey & Co., Ltd.* v. *Goodson Gramaphone Record, Co., Ltd.*, (1930) 1 Ch. 448, which was described as a friendly action, the facts were that the defendants manufactured gramaphone records for the reproduction of musical compositions, the copyright in which belonged to the plaintiffs. At the request of the defendants, and on payment of the proper amount of the royalty, the plaintiffs furnished the defendants with adhesive labels such as they had been accustomed to supply and had proved to be satisfactory. The records manufactured by the defendants, however, were made of celluloid, to which substance, it appeared, the plaintiffs' labels did not take kindly and refused to adhere. In the Court of first instance Mr. Justice Eve decided that the plaintiffs having failed to supply adhesive labels which would adhere to the defendants' records, the latter might be sold without the labels. By way, we suppose, of proving the adhesive quality of the friendliness of the proceedings, the plaintiffs appealed. The Court of Appeal took a different view of the matter from that adopted by Mr. Justice Eve, and held that, although the labels supplied by the plaintiffs would not adhere to the defendants' contrivances, they were nevertheless adhesive labels and that the defendants would be infringing the plaintiffs' copyright if they

sold any of the records in question to which the non-adhering adhesive labels were not adherent. We hope that the defendants will stick to it and take the case to the House of Lords.—*S.J.*, 1930, p. 479.

Breeding Imbeciles with Impunity.—At the Stafford Assizes last week, Mr. Justice McCardie very properly, in our opinion, again called attention to the fact that there are at the present time 400,000 mental defectives in the country, and that "we are breeding imbeciles and idiots every day." At a later stage of the hearing of the case he added: "I am appalled at the breeding of mental defectives that is going on throughout the country. Unless steps are taken to bring about a greater measure of segregation, or sterilisation, this hideous process of multiplying the mentally unfit will go on unchecked." Reform in this direction, as in the case of the divorce and betting laws, is undoubtedly long overdue, but no one has apparently the courage to tackle either problem.—*S.J.*, 1930, p. 480.

The Late Sir Binod Mitter.—The Judicial Committee of the Privy Council has sustained a grievous loss by the untimely death of Sir Binod Mitter. Sir Binod was the first Indian lawyer to be appointed under S. 1 of the Appellate Jurisdiction Act, 1929, which empowered His Majesty to appoint two persons, either Judges of an Indian High Court or barristers, advocates or vakils of not less than fourteen years' standing, who had practised in British India. Till the passing of this Act the representation—if we may use this term—of India on the Judicial Committee was far from satisfactory in the sense that those who were skilled in Indian law were very inadequately remunerated. To some extent this has now been remedied, and general satisfaction was expressed when Sir Binod, little more than a year ago, was selected as an eminent Indian jurist to take his seat and assist in the disposal of Indian Appeals. Unhappily, just as his great merits—a consummate knowledge of the various systems of law in India, and a patient and studied judgment—were becoming widely recognised, the "abhorred shears" have come and "slit the thin-spun life". Eloquent tributes to his memory were paid in the Privy Council this week by Lord Dunedin from the Bench, and by Mr. Upjohn, K.C., in whose chambers Sir Binod was a pupil many years ago, as representing the Bar. As Lord Dunedin well said, Sir Binod was of invaluable assistance to

the committee, not only in deciding the particular appeals at the hearing of which he sat, but also in bringing to the knowledge of his English colleagues a knowledge of the exact state of Indian decisions. He will be greatly missed.—*S.J.*, 1930, p. 493.

CONTEMPORARY LEGAL LITERATURE.

It is not infrequently that one finds the Judge remonstrating against the system which constrains him to follow a judicial precedent. Several elements have contributed to that feeling. In India, the Judges often take shelter under the Indian Law Reports Act and refuse to recognise other reports whenever the precedent does not accord with their view. If the accuracy of the report can be questioned, it may be one thing; but to base it on the merest accident of a case not being reported by the Law Reporter of the Government series, is to say the least, to snap the finger at the rule governing precedents. Virtually, it will be introducing the system prevailing in Europe (Continent) where the system of precedent does not ordinarily obtain. Lord Sumner says in *Palgrave, Brown & Son, Ltd.* v. *S.S. Turid,* (1922) 1 A.C. 397 at 413, that "even if the case had not been reported at all, it would still have been a decision which when brought to light by any means must be regarded as an authority." As is well put in *Mahomed Ali Hossein* v. *Mir Nazar Ali,* (1901) I.L.R. 28 Cal. 289, "A precedent is an authority as precedent whether it is published in the pages of a Law Report or is kept piled up on the grim shelves of the record room of the Court." An interesting and elaborate survey in the *Law Quarterly Review* for April and July, 1930, by Mr. T. Ellis Lewis of the growth of the authority of precedents during the Year Books period (1290-1535) shows that at a time when the theory of precedent as now obtains was unknown or only in the embryo, the Bar and the Bench both longed for it. This is a short summary of the articles:—

In the early days during the Norman period judgments were more treated as evidence of custom rather than as judicial precedents. The theory that judicial precedents were recognised by Bracton is based on the fact that in his *De Legibus et consuetudinibus Angliae* (c. 1250-1260). Bracton cited some 500 cases and has collected about 2,000 cases in his note book. But the note book was not intended to be cited in Court but only to collect materials for his treatise. In

the writer's opinion, Bracton did not regard judicial decisions as binding authorities but merely "as apposite illustrations of the point at issue." He may be said to have laid the foundations of judicial precedent in that he recognised the importance of judicial decisions as a source of law. But he treated them more as persuasive forces to guide judicial discretion and not as binding authorities. The writer refers to the text-writers down to the middle of the 16th century and points out that there is very little citation of cases in them, and even where there is a reference, it is as proving the law and not as binding authority. It may be that from very early times some record was kept of proceedings in Courts of law but no importance was attached to them for the purpose of subsequent cases. The writer refers to the Preface to Plowden Reports, where Plowden says, "Unlike his reports they have not the 'sanction of judgment' and cannot be 'firmly relied upon'." The writer then refers to the following considerations in support of his view that "judicial precedent is a post-Year Book Theory."

(1) The Year Books are mere collections of private notes of cases made in Court by pleaders and apprentices for their own instruction. Some cases are reported differently in different manuscripts and some give contradictory conclusions.

(2) The reports deal largely with the intricate manoeuvres of pleading and the practice of the Court and not with principles of substantive law and many cases turn simply on issues of fact. They served more as a treasure for the mediaeval lawyer providing him with pleas and arguments. The opinions of sergeants and pleaders not engaged in the cases, but who often intervened, all go down in the report and seem to have commanded as much respect as the opinion of the Justices. Even arguments heard out of Court are put down.

(3) The writer picks out some observations of the Judges as supporting his view. Here are some of them.

Bereford, C.J. —"Our judgments are founded, not on precedents, but on reason."

Sharshulle, J.—"No precedent is of such force as that which is right." "Right, reason or justice outweighs all precedents."

Stonor, J.—"No, law is that which is right."

The writer says that in the later Year Books there is hardly any explicit denial of the force of precedent. Even statutes, the writer points out, were interpreted in the light of the Judge's

views at times even to the extent of ignoring them. The writer refers to several annotations of the Year Books during the 16th century and points out that they prove nothing as to the force of precedent in the Year Book period but simply show that the law was usually consistent. Those annotations are anyway important in that they prove that towards the end of the 16th century judicial decisions were acquiring an increasing authority, for on no other grounds can the arduous task undertaken by some Tudor lawyers of incorporating references to previous and later cases in the printed text of the Year Books be explained. Judges were not disposed to be bound by judicial precedents, even their own. They but said "the cases are not alike" or "it is wrong" or "it was never decided," and that put an end to the precedent, for it was not incumbent upon them to say how the cases differed, or why the decision was wrong. These observations apply to Year Books prior to Edward IV, for then citation of cases usually took the form of an appeal to memory. Judges and Counsel gave their recollections of what happened in cases in which they themselves had taken part or which they had heard. The writer says that there are only two cases in the earlier Year Books where Counsel seem to have quoted from some manuscript report which they had with them in Court. But after Edward IV greater care was exercised in citing cases and greater reliance was placed upon them. Even in the earlier Year Books till Henry VI's period, the Judges did pay regard to precedents, but it was out of reverence and such considerations. There are statements here and there which can be quoted in favour of the view that decisions were even then authoritative but there are also several statements where that view was emphatically rejected by the Judges and no inference can therefore be drawn from them that decisions were treated as binding authorities in the modern sense.

The Year Books of Henry VI period differ from those before, in that they gave a fuller account of the arguments, the Judges intervene more frequently and points of law are considered in greater detail. That, the writer says, is due to the fact that the reporters were becoming masters of the art and mainly to the gradual change from oral to written pleadings, a change which began in the middle of the 15th century and became an accomplished fact in the following century. There was yet no marked increase in the cases cited but they were more carefully verified by a detailed examination of the Year Books which were produced in Court.

[We would refer our readers to the discussion of the Year Books by Mr. B. Sitarama Rao in 47 M.L.J. 114 to 118 (Journal) and 49 M.L.J. 152 (Journal).]

There is much justification for the suggestion that the time has arrived when a test case should be taken to the House of Lords on the question of "Landlord's Distress of Hire Purchase Goods." The incidents of a Hire-purchase Agreement have, no doubt, been clarified by the cases in *Helby* v. *Mathews* and *Lee* v. *Butler*. But the right of a landlord to distrain goods in the possession of his tenant, but under a Hire-purchase Agreement rests on the Distress Amendment Act, 1908, which, while exempting goods of third persons from liability to distraint, expressly declares by S. 4 (1) that "The Act shall not apply to goods *comprised in any* Hire-purchase Agreement." Mr. R. Proudfoot (Joint author of Jones' and Proudfoot's Notes on Hire-Purchase Law) in two articles contributed to *Law Journal* for October, 1930, takes up the three cases in (1912) 3 K.B. 225; (1915) 1 K.B. 458 and (1929) 2 K.B. 309 for discussion to show that the time has arrived when the legislature should step in to amend the law in favour of the owners under Hire-Purchase Agreements. The question in all the cases has been whether at the time of the distress, the goods in the possession of the tenant, were *comprised* in the Hire-purchase Agreement. The result of the three cases the writer summarises as follows:—"It may be said that the general effect of the three cases is that, if after termination of the agreement, resort must still be had to the agreement to vindicate the owner's rights in relation to the hired chattel, then the chattel remains *comprised* in the Hire-purchase Agreement. If, however, no powers in relation to the chattel remain under the agreement, and the owner is, after termination, left to his remedy at common law, then the chattel ceases to be comprised in the agreement." All the three were cases of furniture hire and provided for the owner entering on the premises and retaking possession. (1912) 3 K.B. 225 further provided that, should the owners retake the said articles by virtue of the terms of the agreement, the hirer shall have the right either (1) to buy the said articles within 28 days, or (2) to resume the hiring on certain conditions. In (1915) 1 K.B. 458 the clause ran thus:—"If the hirer does not duly perform and observe this agreement the same shall *ipso facto* be determined, and the hirer shall forthwith at his own expense return the said goods to the owners, and the owners shall be entitled to retake possession of the same as being goods wrongfully detained by the hirer." The first is a clear case

but in the second case, notwithstanding the term that the contract shall *ipso facto* be determined, the Court of Appeal held that it cannot be said that the goods were not comprised in the agreement as the license in favour of the owner to enter upon and retake possession, and the agreement by the hirer to pay the rent and all expenses incurred in the collection of any arrears thereof, indicated that the agreement was not dead till the possession was taken but on the other hand was alive as there were subsisting rights and obligations under the agreement. In the third case, the clause improved upon the other two and said that on breach the agreement shall "for all purposes absolutely determine,—nor shall either party thereafter have any rights hereunder but such determination shall not discharge any pre-existing liability of the hirer to the owners." It was held that on termination of the agreement by notice, there was no contractual right or obligation subsisting under the agreement, and that the hiring agreement was "by apt words" determined effectively.

The provision appears to be based on something like the reputed ownership theory and directed against a false credit being obtained by a person "from the visible possession of property" to which he is not entitled. S. 4 (1) of the Distress Amendment Act also exempts from the operation of the Act goods under the reputed ownership of the tenant. But when the possession is such as not to involve the inference that they are the property of the tenants, either because of the existence of a trade custom as in (1929) 1 Ch. 134 and 16 M. & W. 282 or otherwise, the doctrine cannot apply. Under the insolvency law a notice demanding possession has itself been held in some cases to be sufficient to get over the reputed ownership (*see* 47 M. 215; 1 Rang. 153 where English cases are discussed). The writer points out that the clause against Hire-purchase Agreements was put in in the Act of 1908, as then such agreements were looked upon as "deceitful, probably dishonest and certainly immoral." Now that the system has become "notorious," the need for the provision ceases and the later clause in S. 4 (1) excepting "goods in the possession, order or disposition of such tenant by the consent and permission of the true owner, under such circumstances that such tenant is the reputed owner thereof" will be sufficient protection against possible frauds.

In the interest of public health, the legislature has by several statutes laid down that no person shall let

or sub-let or allow any person to enter a building in which he knows or has reason to know that a person has been suffering from a dangerous infectious disease until the Health Officer has granted a certificate that such building may be reoccupied (*See* 38 and 39 Vict., c. 55, Public Health Act, 1875 (of England), Ss. 128, 129 and Madras City Municipal Act, S. 340) and severe penalties are provided for breach of that rule. All Municipal Acts contain such a provision. *The Law Journal* for August 9, 1930, contains a note on the contractual liability of the landlord and tenant when a furnished house is let or occupied. Though in the case of a letting of a house there may not be any implied condition that they are reasonably fit for occupation, such an undertaking is implied in the letting of furnished houses, and a breach of it entitles the lessee to repudiate the tenancy and claim damages for any loss he may thereby have incurred. (See *Wilson* v. *Finch Hatton,* 2 Ex.D. 336, *Smith* v. *Marrable,* (1843) 2 M. & W. 5 and *Collins* v. *Hopkins,* (1923) 2 K.B. 617). The note points out that the danger of infection must be real and not merely bred in the imagination. There is no corresponding undertaking by the tenant of a furnished house, that he is a suitable person to occupy them (*Humphreys* v. *Miller,* (1917) 2 K.B. 122), and therefore the landlord cannot throw up the contract or even claim damages in the absence of actual deceit and misrepresentation. The note then says that "where infection breaks out among tenants of a furnished house the landlord cannot recover against them any loss which this may entail as regards future lettings. But if on the departure of the infected tenants, the landlord takes steps to have the premises thoroughly cleansed, a duty which is, indeed, imposed upon the outgoing tenants under the Public Health Acts, it seems reasonably clear that he can insist upon any incoming tenants, who are already under agreement, abiding by their contract. There are still many people who would not go in under these circumstances, but if the landlord insists, it will be difficult for them to resist a claim for the full amount of the rent agreed on."

BOOK REVIEWS.

THE INDIAN REGISTRATION ACT, by R. H. Bhalunkar. Second Edition. Price Rs. 3.

This enlarged edition of the Indian Registration Act by the author containing all the information, with adequate notes and comments under each of the various sections, will be found

useful by both practitioners and students. There is an earnest attempt to treat the subject in a clear and exhaustive manner and the cases collected, show much discretion and care on the part of the writer. The successive amendments of the Act up to the present time, have been incorporated, and the Introduction gives us a concise though scarcely negligible account of the history of the law of registration in this country.

THE LAW OF TRANSFER IN BRITISH INDIA, by Sir H. S. Gour. Sixth Edition, Three Volumes. Published by Messrs. Butterworth & Co., Ltd. Price Rs. 45.

Since the enactment of the recent amending Acts to the Transfer of Property Act, various commentaries of the amended Act have appeared; and it was naturally to be expected that Sir H. S. Gour would bring out a new edition of his treatise on the subject. Ever since the publication of its first edition Dr. Gour's work has been looked upon as the most exhaustive book on the subject; and succeeding editions have increased the popularity of the work, especially as the well-known commentaries on the Act by Sir Horatio Shephard and Mr. Kenworthy Brown became out of date. While the student may be occasionally embarrassed by the conflicting mass of case-law, the lawyer has always turned to this work as a mine of information on the Act and allied topics. We therefore cordially welcome this edition which is a commentary on the Act as amended. We might perhaps make one observation that as the sections of the original Act would govern the transactions entered into prior to the 1st April, 1930, and they would frequently be coming before the Courts at least for some years to come, the giving of the old and the new sections in parallel columns in the body of the work itself as has been done in some of the commentaries on the Act would not have been without its usefulness. Relegating the altered language of the old Act to the footnotes, as has been adopted by the learned author in the body of his work, would involve some strain on the reader in getting a connected idea of the old sections. We have no doubt that this edition of the work will enjoy the popularity of its preceding ones and find its place among the standard works of reference in an Indian Lawyer's library.

THE LAW RELATING TO INAMS, by K. Raghava Chari, M.A., B.L., Vakil, Cocanada.

The Law Relating to Land Tenures in this country is not generally clearly understood and this book which deals with the

problems connected with the Inam tenures is therefore particularly useful. In it, the learned author has dealt comprehensively with the nature of inams and the questions relating to the alienation, resumption, enfranchisement and occupancy rights with respect to them. The book is full of interest and we would draw special attention to the discussion of the question of the right of the Crown in the soil in this country. The decisions on the subject are noticed in their appropriate places and the book does not consist in a mere collection of the points decided in the cases but a treatment to the whole subject in a synthetic form. We would, therefore, recommend the book to students and lawyers alike.

[END OF VOL. LIX.]